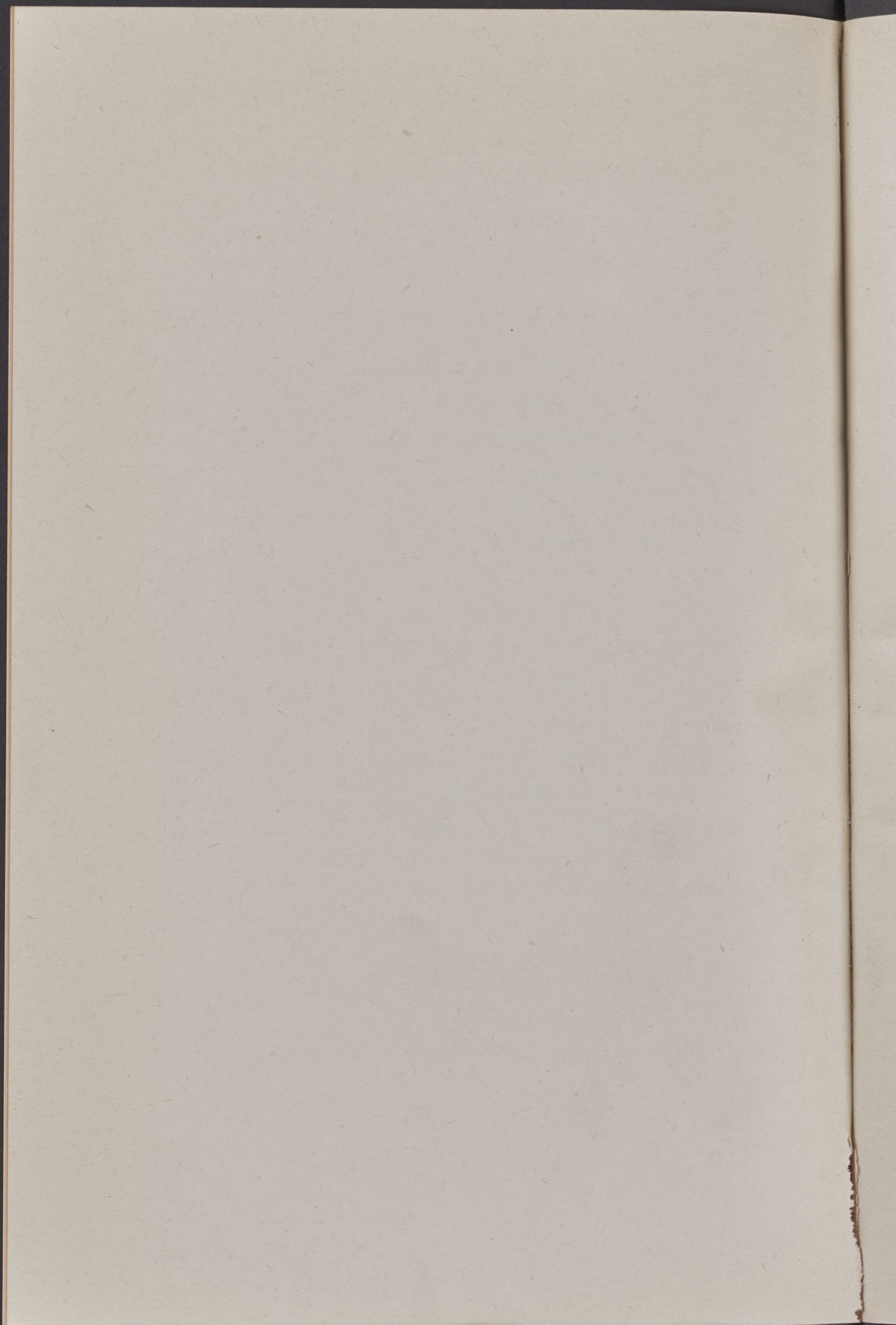


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COPY OF RULE AND NOTICE OF APPEAL.

(Filed Jul. 24, 1917)

Notice and Grounds of Appeal.

NEW JERSEY SUPREME COURT.

FRANK S. CORNELL,
*Plaintiff and
Respondent,*
vs.
WEST JERSEY & SEASHORE
RAILROAD COMPANY,
*Defendant and
Appellant.*

NOTICE AND GROUNDS
OF APPEAL.

10

20

To Wescott and Weaver, Attorneys of Plaintiff:

Take Notice that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. Because of errors in the record.
2. Because the Court reversed the judgment below, whereas it should have affirmed said judgment.

30

GASKILL AND GASKILL,
*Attorneys of Defendant and
Appellant.*

2 *Copy of Rule and Notice of Appeal*

[ENDORSED]

Service acknowledged June 14, '17.
Wescott & Weaver,
Attorneys of Plaintiff.
Filed Jun. 26, 1917.
Wm. C. Gebhardt,
Clerk.

10

Rule of Reversal and Remittitur.

NEW JERSEY SUPREME COURT.

FRANK S. CORNELL, <i>Plaintiff-Appellant,</i>	}	ON APPEAL FROM CAMDEN COUNTY COURT OF COMMON PLEAS. RULE OF REVERSAL AND REMITTITUR.
VS.		
WEST JERSEY & SEASHORE RAILROAD COMPANY, <i>Defendant-Respondent.</i>		

20

30 This cause coming on to be heard at the February Term, one thousand nine hundred and seventeen, in the presence of the respective parties, and the case having been read, and the argument of counsel as well as the record and proceedings duly considered upon the appeal set forth and specified in the grounds of appeal, &c.,

It is thereupon, on this 25th day of June, in the year of our Lord, one thousand nine hundred and seventeen, Ordered, Adjudged and Decreed that the

judgment of the Camden County Court of Common Pleas heretofore entered in this cause be reversed and a *venire de novo* awarded, and that the record and proceedings be remitted to the Camden County Court of Common Pleas to be therein proceeded on according to law and the practice of said court.

Entered June 25, 1917.

On motion of 10

WESCOTT & WEAVER,
Attorneys of Appellant.

I, William C. Gebhardt, clerk of the Supreme Court of the state of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the court 20
in the above-stated cause.

(Seal) In testimony whereof I have set my hand and the seal of said court at Trenton, this twenty-eighth day of June, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

30

COPY OF JUDGMENT.CAMDEN COUNTY COURT OF COMMON
PLEAS.

	FRANK S. CORNELL,	_____	
	<i>Plaintiff,</i>	}	
10	VS.		ACTION AT LAW.
	WEST JERSEY & SEASHORE		NOTICE OF APPEAL.
	RAILROAD COMPANY,		
	<i>Defendant.</i>	_____	

To Gaskill and Gaskill, Attorneys for Defendant:

SIRS:

20 Please take notice that the plaintiff appeals to the Supreme Court of the state of New Jersey from the whole of the judgment entered in the above-entitled cause.

Dated January 17th, 1917.

WESCOTT & WEAVER,
Attorneys of Plaintiff.

30

[ENDORSED]

Service of the within notice of appeal acknowledged this 17th day of January, 1917.

Gaskill & Gaskill,
Attys. for Defendant.

STATE OF NEW JERSEY,

(Shield)

COUNTY OF CAMDEN.

I, FRANCIS F. PATTERSON, JR., clerk of the county of Camden, do hereby certify, that the foregoing is a true copy of notice of appeal in the case of Frank S. Cornell vs. West Jersey & Seashore Railroad Company, Action at Law, filed January 18, 1917, in the clerk's office of the county of Camden. 10

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at Camden, this eighteenth day of January, A. D. 1917.

F. F. PATTERSON, JR.,
Clerk.

(Seal)

JUDGMENT ON NON-SUIT.

20

THE STATE OF NEW JERSEY.

CAMDEN COUNTY COMMON PLEAS COURT.

WEST JERSEY & SEASHORE

RAILROAD COMPANY,

ADS

FRANK S. CORNELL.

} ACTION AT LAW.
JUDGMENT ON NON-
SUIT.

30

APPEARANCES:

Witness, WILLIAM T. BOYLE, Judge.

GASKILL & GASKILL, Attorneys.

F. F. PATTERSON, JR., Clerk.

Judgment entered on the fifteenth day of January, A. D. nineteen hundred and seventeen.

Costs, \$41.39.

The plaintiff, Frank S. Cornell, of the city and county of Camden, in the state of New Jersey, says:

10 1. That on the ninth day of July, 1915, he was employed by the West Jersey & Seashore Railroad Company, and at the time aforesaid was engaged in unloading telephone poles from one of defendant's cars at Egg Harbor, in the county of Atlantic and state of New Jersey, which car and the train attached thereto was engaged in interstate commerce and transportation.

20 2. That said telephone poles and the car in which they were carried were shipped by the defendant from the state of Pennsylvania into the state of New Jersey.

3. That at the time and place aforesaid the plaintiff, in the performance of his duty, was standing on said car and was in the act of rolling one of said poles to the edge thereof for the purpose of getting said pole to the ground.

30 4. That the defendant negligently and carelessly, and without fault on the plaintiff's part, permitted certain spikes or bolts to protrude from said poles, which condition was unknown to the plaintiff.

5. That as said pole was falling over the edge of said car, one of said spikes or bolts caught in a glove which the plaintiff was wearing and caused him to be thrown from the top of said car to the ground.

6. That as a result of the occurrences above set forth, the plaintiff's right leg came into contact with one of defendant's tracks and caused the bone of said leg to be broken and splintered and said telephone pole struck the plaintiff upon the head and injured him severely and permanently, whereby and because of which, plaintiff has become partially paralyzed and has been caused to forego all employment and to suffer pain of body and mind and to expend money in an effort to be relieved of his injuries, all of which conditions are permanent. 10

7. That the plaintiff brings this action under the Federal Employer's Liability Act of April 22nd, 1908, C. 149, and also under the Safety Appliances Act.

Because of his injuries received as aforesaid, the plaintiff claims damages from the defendant in the sum of ten thousand dollars. 20

The defendant, a corporation of New Jersey with offices in the city of Camden, answering says:

1. It admits the matters stated in the first paragraph of the complaint.

2. It admits the matters stated in the second paragraph of the complaint. 30

3. It admits the matters stated in the third paragraph of the complaint.

4. It denies the matters stated in the fourth paragraph of the complaint.

5. It admits the matters stated in the fifth paragraph of the complaint.

6. It is not informed as to the matters stated in the sixth paragraph of the complaint.

First Ground for Defense:—That there was contributory negligence on the part of the plaintiff because he had assumed the risks of the said accident.

10

Second Ground for Defense:—That there was contributory negligence on the part of the said plaintiff because he had not exercised the degree of care required by law.

Third Ground for Defense:—That there was no negligence on the part of the defendant, its servants, agents and employees under the said Federal Employer's Liability Act and under the Safety Appliances Act.

20

Therefore, let a jury come before our Judge of our Common Pleas Court in and for the county of Camden, to be holden at Camden, in the county aforesaid, on the second Tuesday of December, one thousand nine hundred and sixteen, by whom the truth of the matter may be better known, and who neither, etc., to recognize, etc., because as well, etc., the same day is given to the parties aforesaid, then etc.

30

And, now, at this day, to wit, the fifteenth day of January, one thousand nine hundred and seventeen, before our said Common Pleas Court, in and for the county of Camden, at Camden, come the parties aforesaid by their attorneys aforesaid, and the jurors of that jury being summoned, also come who to speak the truth of the matters within contained,

were tried and sworn; and after evidence being given to them thereupon, the defendant moved the Judge to direct a non-suit by reasons that the matters aforesaid, so given in evidence as aforesaid, by the plaintiff do not support the case set forth in the complaint and the argument of counsel being thereupon heard and due consideration had it is deemed that the plaintiff be non-suited, whereupon the jury are discharged from the further consideration of the premises.

10

Therefore, it is considered that the plaintiff take nothing by his said writ but that he be in mercy, etc., and that the defendant do go thereof without day, etc., and it is further considered that the defendant do recover against the plaintiff the sum of forty-one dollars and thirty-nine cents for its costs and charges by it about its defense in this behalf laid out and expended, by the Court here adjudged to the defendant, and with its assent, and that the defendant have execution thereof, etc.

20

Judgment entered and signed this fifteenth day of January, one thousand nine hundred and seventeen.

WM. T. BOYLE,
Judge.

STATE OF NEW JERSEY,

(Shield)

30

COUNTY OF CAMDEN.

I, FRANCIS F. PATTERSON, JR., clerk of the county of Camden, do hereby certify, that the foregoing is a true copy of record and proceedings in the case of Frank S. Cornell vs. West Jersey & Seashore Rail-

road Company, Action at Law, filed January 15, 1917, and recorded in the clerk's office of the county of Camden, in Book B of Common Pleas Judgments, page 287.

In Testimony Whereof, I have hereunto set my hand and affixed by official seal,
(Seal) at Camden, this eighteenth day of January, A. D. 1917.

F. F. PATTERSON, JR.,
Clerk.

10

GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

20	FRANK S. CORNELL, <i>Plaintiff-Appellant,</i>	}	GROUNDS OF APPEAL. ACTION AT LAW.
	vs.		
	WEST JERSEY & SEASHORE RAILROAD COMPANY, <i>Defendant-Respondent.</i>		

The appellant states the following grounds of appeal:

- 30 1. The trial Court erroneously ordered a non-suit against the appellant and in favor of the respondent, whereas the trial Court should have permitted the jury to pass upon the questions involved.

WESCOTT & WEAVER,
Attorneys of Appellant.

TESTIMONY.

CAMDEN COUNTY COURT OF COMMON PLEAS.

FRANK S. CORNELL,

vs.

WEST JERSEY & SEASHORE

RAILROAD COMPANY.

TESTIMONY.

10

Camden, N. J., January 15, 1917.

Before HON. WILLIAM T. BOYLE, Judge, and jury. 20

APPEARANCES:

For the plaintiff: WESCOTT & WEAVER, ESQS.

For the defendant: GASKILL & GASKILL, ESQS.

FRANK S. CORNELL, SWORN.

Direct examination.

30

By Mr. Wescott:

Q. You are the plaintiff in this case, are you, Mr. Cornell?

A. Yes, sir.

Q. And where do you live?

A. 430 Royden Street, Camden.

Q. Where were you born and brought up?

A. I was born in Wilmington and brought to Camden when I was six years old and resided here ever since.

Q. Born in Virginia?

A. Wilmington, Delaware.

Q. How old are you?

10 A. Twenty-five.

Q. You met with an accident on the ninth of July, 1915, as I understand it?

A. Yes, sir.

Q. Before that time, what was the condition of your health?

A. Good.

Q. Were you sickly?

A. No; I wasn't sickly. I was in good condition, able to do hard work.

20 Q. And your weight was about what?

A. About 150.

Q. Is that what you weigh now?

A. About 155.

Q. What kind of work did you do?

A. I was employed as a lineman.

Q. How long had you been at that work?

A. Well, I had just been back with the railroad company since February. I had been working at the work about five years, I should say.

30 Q. This accident occurred where?

A. Egg Harbor City.

Q. New Jersey?

A. New Jersey.

Q. About what time of the day?

A. Around noon or a little after.

Q. What had you been doing before you mounted the car to remove the poles?

A. Sitting in the car, riding around. There had been considerable trouble that day on the road and the railroad was blocked and the train engaged to help unload these poles was held up on that account.

Q. Did that put your work behind?

A. Yes, sir.

Q. Did that necessitate your working rapidly?

10

Mr. Gaskill: I object to that as leading and suggestive.

The Court: Objection sustained.

By Mr. Wescott:

Q. Did you work rapidly or slowly?

A. We were making up time, to make up the time, and our train had gone down below Egg Harbor and we were working north, that is to say, we were working south of Egg Harbor, we were working to Egg Harbor Station. 20

Q. What was the size of those poles?

A. About thirty feet long, old poles cut in half.

Q. On what?

A. On this car, piled over the side of the car with stanchions supporting them and wire across the top.

Q. Have you any idea about the number of them on this car? 30

A. I should say about thirty of them.

Q. And about what diameter?

A. Well, they were good sized, had a top of—I just don't know what the top was, but I know they were big.

Q. Used for what purpose?

A. For standing upright in the air, holding telephone wires.

Q. For what purpose?

A. Holding telephone wires.

Q. Regular telephone ———?

A. Telephone poles; yes, sir.

Q. Old or new poles?

A. They were old poles.

10 Q. How many of you were there working in this car?

A. I just don't know how many; I should say about ten in the gang. I say that, and I believe they had two section gangs from Atlantic City to help us and our gang was on the top of the car.

Q. Have you any idea how many on the top of the car?

A. No, sir, I don't. There were a number up there to lift these poles off, to throw them off.

20 Q. Who was the boss?

A. A man by the name of Simpson Johnson.

Q. What orders did he give you?

A. We got on the car and when we got ready to unload them he told us to unload them, and we threw the first one off and the train moved forward for the second one to throw off and we were hurrying to make up time.

Q. Did he say anything to you with reference to hurrying?

30 A. He told us to hurry up.

Q. While you were in your work?

A. Yes, sir.

Q. What is the first thing you did?

A. The first thing was to hang on the top of the car from the passenger coach and cut the wires from the stanchions, and somebody else lifted the stan-

chions out and one man had his job up after the first pole was thrown off the top of the car.

Q. Require how much effort?

A. Didn't require much of an effort. The second one got out to lift over the poles and while I was standing stooped over in an effort to get at the pole this bolt hooked me in the glove.

Q. Where was this bolt in reference to your ability to see?

A. I didn't see the bolt. I was at the top of the pole and the bolt must have been concealed. If it had been plain, I could have seen it. 10

Q. The bolt was where?

A. In this pole, projecting up this way (indicating).

Q. Was it sticking upright?

A. No, sir; it was concealed.

Q. What do you mean?

A. It was hid.

Q. You mean it was on the bottom part of the pole? 20

A. The bolt must have been turned down. I didn't see it.

Q. Was there any appearance of a bolt at all before your eyes?

A. No, sir.

Q. When you were pushing this pole off, what motion did it take?

A. It required us to lift it, then to roll, and I was stooping over like this (indicating). 30

Q. Doing what?

A. Rolling this pole off the side of the car.

Q. Where did you have your hands?

A. On the top of the pole, this way (indicating), rolling it like that.

Q. How near was the pole to the edge of the car?

A. Right near the edge, just ready to go off.

Q. Was it there when you began to roll it in that position?

A. We partly lifted it and ready to give it a push, the final push.

Q. Have you any idea how long this spike was?

A. I judge at least five inches.

10 Q. What happened to you when the pole turned over?

A. I don't remember. I know I went off the car.

Q. What happened to you as you turned the pole over?

A. As I turned the pole over, this bolt hooked me in the glove and pulled me off.

Q. Have you got the glove?

A. Yes, sir.

Q. Is that the glove?

20 (Examining counsel hands glove to witness.)

A. Yes, sir. It has been sewed.

Q. Where did it hook?

A. Right in there (indicating).

Q. What effect did it have on the glove?

30 A. Ripped that glove all the way down into here (indicating), and when the young man gave it to me he had sewed it up. You can see where it has been torn to there.

Q. And was the glove torn from where I hold my left hand down to my right-hand thumb?

A. Yes, sir.

Q. When it was brought back to you, it was sewed up?

A. Sewn.

Mr. Wescott: I offer that glove in evidence.

(There being no objection, glove is admitted in evidence and marked "Exhibit P1.")

Q. When this spike caught in your glove, what happened to you?

A. I went over in the air, round and round.

Q. Do you know how you struck the ground or what part of it? 10

A. No, sir; I never felt it when I hit.

Q. Well, after you hit, did you?

A. No, sir; I was unconscious.

Q. How long were you unconscious?

A. I believe I was long enough for them to lift the pole off my head and to pick me up. I was lying out with my arms like that (indicating) by a number of Italians and one Italian had his hand on my leg, working it like this (indicating) when I came to.

Q. Well, when you came to, you were where? 20

A. I was on the ground and in this man's arms.

Q. At the place where the accident happened?

A. Yes, sir; at Egg Harbor City.

Q. Then, what was done with you?

A. I was carried and lifted in the passenger coach and lifted feet forward in a passenger coach and laid out on the back of seats and the train was moved forward to the station and a doctor was secured.

Q. Where was that?

A. Egg Harbor City. 30

Q. Then, where did you go?

A. Then they brought me to Camden from there; the doctor ordered me taken to the hospital and they brought me to Camden to Cooper Hospital.

Q. How long were you at Cooper Hospital?

A. 58 days.

Q. How were you injured, Mr. Cornell?

A. This right leg femur was broken right up here through the hip, and through the head here, right in through here (indicating). This rib was all black and blue, the back of my scalp was pierced where the stone ballast pierced the back of my head.

Q. Who is your doctor?

A. Dr. Barrett, since I came from the hospital.

Q. At the hospital?

10 A. Dr. Nicholson was in charge of the ward and the young man interne there was named Broaks.

Q. Tell us something now about the pain that you suffered, if you did suffer any.

A. This leg, it gives me considerable trouble after using it, and in cold weather severe pains come in through the leg down in here, and at times it swells and the leg gets all like goose flesh, and my head I suffer —

Q. I haven't come to your head yet.

20 A. And the leg doesn't seem to have standability.

Q. Tell us all about that leg, any inconvenience you suffer, pain you suffer and when you suffer it, tell us all about it. You know and these twelve gentlemen don't know.

A. The pain,—the leg is weak when I walk at times, the leg seems to bend from under me, and in getting up and down steps it doesn't seem to have the strength the other has to lift me, then the leg is short.

30 Q. Have you any idea how much shorter?

A. I judge about an inch and a quarter.

Q. How about your ability to walk?

A. It makes me have a limp. It becomes very tiresome after walking, too, with that limp.

Q. And your ability to use it, stand on it, to work?

A. It makes me stand lopsided, and I have to put

it on this knee like to support it. I will never be able to climb again with it.

Q. Suppose you had to walk fifteen or twenty miles?

A. I don't believe I could.

Q. How much can you walk?

A. I can walk considerable, but after walking any distance it becomes tired.

Q. Can you keep on?

A. No, I have to sit down and rest.

10

Q. How about standing?

A. It bothers me in standing; it gets weak, sort of bends from under me.

Q. At nights have any trouble?

A. At nights I can't lay on that side very well on account of it is sore like where the break was.

Q. Did you say something about damp weather?

A. It gives me considerable trouble then; gives me considerable more trouble in damp weather and severe cold weather than any other time.

20

Q. You said something about swelling?

A. Yes, sir; the flesh gets all goose flesh like.

Q. Did this injury to the back of your head and rib disappear?

A. The trouble with my rib has disappeared, but this trouble with my head hasn't disappeared.

Q. Tell us now all about your head.

A. This side of my face here is numb and tingles and severe sharpshooting pains start up here in the temple and all down through here, and when I go to shave it is so sensitive to touch, and when I go to shave it requires me to pull my face up like that (indicating), and it pretty near feels that I hadn't all my head, and it is numb and gets severely cold, and in going out in cold weather the pain gets a great

30

deal worse and stronger—it goes all the way back to this ear.

Q. How about the inside of your head?

A. At times it all swells up like as though there were not room enough in there for what was in there.

Q. What little there is in there?

A. Yes, sir.

Q. There is more there than you imagine.

10 A. The eye —

Q. We will come to your eye in a minute. Do you have any headaches?

A. Yes, sir. I haven't been without a headache since the day I was hurt; suffer constant headache.

Q. How about your sleeping?

A. That don't do very good.

Q. Head ever wake you up at nights?

A. At nights it is a great deal worse because I am quiet, I guess.

20 Q. Have you noticed any change in the movement of your bowels?

A. At times they are real loose.

Q. How often does that happen?

A. Every now and then.

Q. Ever have that experience before?

A. No, sir.

Q. Suffer any with nervousness?

A. Yes, sir.

Q. Tell us about that.

30 A. At times it seems as if anyone should make an unnecessary noise and I should know it, it just seems as though it turns my stomach upside down and a lump comes up in my throat and my heart beats like that and I am all trembly afterwards.

Q. How often does that occur?

A. If I should be walking along the street and

hear an unnecessary noise, or you should drop something in back of me and I wasn't looking for it, it would occur.

Q. You said something about your eye. Any trouble with that?

A. Yes, sir; that eye has no feeling the same as my face.

Q. Did you wear glasses before this accident?

A. Yes, sir; I wore those with the rims on.

Q. Why did you dispense with them?

10

A. I can't stand that pressure right here on account of the pain in my head.

Q. When you are walking along the ground, do you have any peculiar sensation?

A. It seems as though everything goes shooting around and I can't walk straight.

Q. How often does that happen?

A. That happens occasionally, now and then.

Q. What do you mean by occasionally?

A. Sometimes I will be sitting still and especially if I should bounce off bed or get up off a coach, or walking, like that.

20

Q. That is when this sensation comes the most?

A. Yes, sir; and at times I can be walking down the street and this feeling comes right over me.

Q. Suppose you step up here (indicating in front of jury box). Which one of your eyes is it?

A. The left one.

Q. Can you stick anything in that eye without hurting it?

30

A. The finger.

Q. Can you stick a piece of paper in there without it hurting you?

A. Yes, sir.

Q. Or, you can use a lead pencil.

Mr. Gaskill: No, no.

By Mr. Wescott:

Q. Now, can you feel your eye with that piece of paper, for instance? Right on the sight (placing piece of paper on sight of eye), do you feel that?

A. No, sir.

Q. Let us see you stick that paper in your eye.
10 Can you touch that eye with anything without feeling it?

A. Yes, sir; and back through here, that is swollen on the left face.

Q. Did you have that trouble with your eye before you got hurt?

A. No, sir.

Q. How about your ability to see?

A. When I see, there is a smear, a scum over that eye like.

20 Q. Can you see as well as you ever could with your right eye?

A. Yes, sir; the right eye seems to be all right. It aches considerably and in sympathy with this one.

Q. It aches?

A. Yes, sir.

Q. How often do you have eye ache?

A. Well, if I use it, it aches considerably more than if just walking along. There is a certain amount of pain there all the time with this head.

30 Q. You had none of this trouble before you got hurt?

A. No, sir.

Q. What do you notice, if anything, about the action of your heart and your breath?

A. I notice if I undertake to do anything or walk up steps, undertake to walk up steps fast, I become

short breathed and my heart seems to pound like that (indicating), and if I undertake to lift anything it seems as if the blood vessels in my head swell right up.

Q. What effect does that have on your heart action?

A. It makes it beat strong and rapid. It annoys me at night upon retiring. I have to keep my head lifted like.

Q. Lifted?

10

A. Yes, sir.

Q. Why?

A. On account of it seems to make my heart beat so the blood seems to rush up to my head like.

Q. Did you ever have that experience before?

A. No, sir.

Q. How much were you making?

A. \$3.20 a day for ten hours.

Q. When you were injured?

A. Yes, sir.

20

Q. How much was that a week?

A. \$19.20 a week.

Q. What do you do now?

A. I am employed as a clerk at the New York Shipbuilding Company.

Q. And what does your work consist of there?

A. Why, a little writing and copying of some cards, an index system like.

Q. How many hours do you work?

A. Eight and three-quarters hours a day.

30

Q. How much do you make?

A. \$10.08.

Q. How long were you laid up all together?

A. I was laid up until the 27th of June and I went to work then and I wasn't feeling able to go to work, but I went to work because I had to.

Q. Until when, the 27th of June?

A. From the 9th of July, 1915, until the 27th of June, 1916.

Q. That was about a year?

A. Yes, sir.

Q. How has your general health been since you met with this accident?

A. It hasn't been very good. I have never felt like myself since I have been hurt.

10 Q. Have you improved much or little?

A. Little.

Q. Any trouble in masticating your food? Chewing your food?

A. Not before I was hurt, but since I have been hurt while in the hospital I complained of having a great deal of trouble in here (indicating) and chewing my food at the present time it shoots a pain up here to the temple and requires me to chew on the other side.

20 Q. What is usually furnished people that are out working on these heavy logs?

A. Should have a cant hook.

Q. Cant hook?

A. Yes, sir; a long stick with a hook on the end of it and you put this stick on the top of the pole and use this hook in the bottom to roll these poles.

Q. That makes the work safe?

A. Yes, sir.

30 Q. Does that make the work safe or unsafe?

Mr. Gaskill: I object; that calls for a conclusion.

The Court: Why, isn't that so? Your question calls for a conclusion.

(Question withdrawn.)

By Mr. Wescott:

Q. What is the use of a cant hook?

A. The use of the hook makes the work easier and more safe.

Mr. Gaskill: I ask that that be stricken out.

The Court: The answer will stand.

10

(Whereupon the defendant by its counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

(Seal)

By Mr. Wescott:

Q. Was there a cant hook there on this occasion?

A. I believe there were two. They were on the extreme end of the car, on the heavy end of the pole. The small end always rolls first.

Q. And where were you?

A. I was at the small end.

Q. Was there a cant hook furnished you?

A. No, sir.

Q. How many men engaged on that car with you?

A. I should say about 10.

Cross-examination.

30

By Mr. Gaskill:

Q. Where did you and the men who were working with you first get on the car that day?

A. Hammonton.

Q. At Hammonton? How many cars of those poles were there?

A. We had an engine, coal tender, passenger coach and this carload of poles.

By Mr. Wescott:

Q. Did you load those poles?

10 A. No, sir.

By Mr. Gaskill:

Q. You and the men rode down in a passenger car, did you?

A. Yes, sir.

Q. And where was it that you first got on the car of poles?

A. At the extreme end of the siding at Egg Harbor City.

20 Q. Did you start unloading there?

A. Yes, sir.

Q. Now, I understand that there was some trouble in the operation of your train that morning on account of other service on the road?

A. Yes, sir.

Q. Were you in your passenger car until the time that you began unloading the poles?

A. Yes, sir.

30 Q. You had been a linesman for about five years?

A. Yes, sir.

Q. And you were familiar with the way in which the crossarms remain fast to the poles for the purpose of carrying the wires?

A. Yes, sir.

Q. And you knew after you got on this car of poles

to unload that it was a car of those kind of poles to unload?

A. No, sir; I hadn't been working on that job; never worked on it.

Q. You didn't know you were to unload old poles until you got on the car for that purpose?

A. That is the idea.

Q. But when you got on the car, you saw they were poles that had been used before?

A. Yes, sir.

10

Q. Did you get on the car at the small end of the poles? Or were they laid with some big butts at one end and also some small tops at that end?

A. They were laid irregular.

Q. Irregular?

A. Yes, sir.

Q. That is, at your end there might be some tops and some butts?

A. Yes, sir.

Q. You were one of the first men on the car, I presume, if you cut the wire that fastened the stanchions together?

20

A. We all got on there almost together. We were all ready to get on just as soon as the train stopped.

Q. After you cut the wire and somebody else pulled the stanchions out, did any of the poles drop over?

A. No, sir.

Q. You had to roll them?

A. The first one you had to push.

30

Q. And as I understand it, you got hurt while working on the second pole?

A. Yes, sir.

Q. Now, when you were climbing over this car of poles, you saw that the tops had been cut for cross-bars to go over, didn't you?

A. No, sir; I wasn't looking for anything like that. The man who —

Q. You have answered the question, wait a minute. This pole that threw you over the car, as I understand, you and the other men had lifted from below or back of the pole that was in front of it, you had to get it up and on to the other pole so that you could turn it over, is that so?

A. No; the poles were lying like this (indicating)
10 and the second pole was lying right on top and we simply lifted the pole at the top a little way so as to push it off.

Q. You are demonstrating there with your hands. We don't understand entirely what you mean. As I understand, this second pole was partially behind another pole, is that so? I want this jury to get a picture of this thing and they can't get it by your demonstrating with your hand. The first pole you pushed off was the easiest one to get off the car?

20 A. Yes, sir.

Q. And this second one, was that the next easiest to get off?

A. Yes, sir.

Q. And was it partially behind another pole?

A. No, sir.

Q. This second pole was the next easiest one to get over?

A. Yes, sir.

30 Q. I understand you had to do some lifting on that. Was the lifting on your end, the top end, or down at the butt end?

A. The lifting was at the top so we could get our feet back of it to lift it over.

Q. You wanted to get the top up so you could get your feet down in position where the top had been?

A. Yes, sir.

Q. So that you started out to lift the top?

A. Yes, sir.

Q. And the men down at the other end rolled the butt?

A. Yes, sir; they rolled it with the cant hooks.

Re-direct examination.

By Mr. Wescott:

10

Q. Was this a crooked or straight pole?

A. I believe it was slightly crooked.

Mr. Wescott: I would like to offer this other glove in evidence.

(There being no objection, glove admitted in evidence and marked "Exhibit P2.")

20

FRANK S. CORNELL, recalled.

By Mr. Wescott:

Q. Did you ever work before in moving poles that had spikes in them?

A. No, sir.

Q. How many carloads of poles have you helped to unload in your time?

A. Well, I never kept account of them, as far as 30 that. Poles that I always worked on were new.

Q. Well, about how many?

(Question withdrawn.)

Q. It has been stated here by Dr. Barrett that you

went to a specialist in some hospital. You didn't tell me about that.

A. Yes, sir. I went in the first place out to the Dental Institute at Fortieth and Spruce, University of Pennsylvania.

Q. How many times did you go there?

A. I went there twice. The first time I went, the doctor took an instrument and went all over the side of my face.

10 Q. Well, he took an instrument and went over the side of your face?

A. Yes, sir; and asked me if I felt it.

Q. How many times did you go to that hospital?

A. Twice.

Q. Where else did you go?

A. He offered to take me before a class of students and demonstrate to the class of students the condition of my face. He referred me to a man at the University of Pennsylvania and gave me a letter to

20 see him.

Q. Did you go to him?

A. Yes, sir.

Q. How many times did you go to him?

A. Well, he examined me that day and asked me how I would like to come and stay a few days, and he communicated with me.

Q. You just went there?

A. Yes, sir.

Q. Did he examine you?

30 A. Yes, sir.

Q. And did you go anywhere else?

A. No, sir.

Q. How much has been your expense for medicines and doctors?

A. I never kept any items of account; I exhausted all the funds I had.

Q. Do you know how much you have spent?

A. No, sir; I never kept an itemized account.

Q. Can you approximate it without getting beyond the actual amount that was spent?

A. Well, Dr. Barrett, I have always paid him when I went to the office and I laid in Cooper Hospital for 58 days, the price of an X-ray, I have never paid those.

Q. Do you know what the charge is?

A. No, sir; I don't. When I left I told them I would pay when I was in a position to pay, and I went to the Homoeopathic Hospital for high frequency treatment on this left side of my face—high frequency current.

Q. What did that cost?

A. They are worth \$2 a treatment, and I went four or five weeks three times a week.

Q. Did you go anywhere else?

A. I went over to the University of Pennsylvania and stayed there and paid my board at a dollar a day. I was there five days, and, of course, carfare going and coming, and several visits I made after I came home from there.

Q. Did you pay for those?

A. No, sir.

Q. Is that all, or did you go to some other expense?

A. Why, I paid a visit to Dr. Mecray.

Q. How?

A. I paid a visit to Dr. Mecray.

Q. When did you pay a visit to Dr. Mecray?

30

A. About a year ago the third of this month.

Q. Where did you see him?

A. In his office.

Q. And did he prescribe for you?

A. Yes, sir.

Q. What was your bill from him?

A. Well, the railroad company—the relief doctors—I felt that they didn't think anything was the matter with me and they said, "Why didn't you see Dr. Mecray and let him see that," and I went in to let Dr. Mecray see that and when I went in he wanted to know who sent me.

Q. Well, who did send you, as a matter of fact?

A. The relief doctor.

10 Q. What do you mean?

A. At the railroad.

Q. Railroad doctor?

A. Yes, sir.

Q. He claimed there was nothing the matter with you?

A. Yes, sir.

Q. And wanted you to go see Dr. Mecray to find out whether there was or not?

A. Yes, sir.

20

Re-cross examination.

By Mr. Gaskill:

Q. You were drawing relief benefits from the relief department of the railroad?

A. Until April tenth, I believe, and then they discontinued them.

Q. How much were those relief benefits?

30 A. Fifty cents a day.

PLAINTIFF RESTS.

Mr. Gaskill: I move for a direction of a verdict for the defendant in this case, on the ground that the plaintiff's proof hasn't shown any negligence on the part of any of the officers, agents or employees of the defendant, or by reason of any defect or insufficiency due to its negligence in its appliances, machinery, track, roadbed, works or other equipment. This man was injured through his negligence and not through the negligence of the defendant. It was his negligence in lifting up, holding on to this pole with this long bolt in it, which if he didn't see he should have felt because he had his hands underneath to lift it up, and he was engaged solely in the work of lifting in order that somebody else might roll, and in doing that in that careless manner, leaving his hand there where the glove could be caught by this bolt, was his negligence. There is no proof that the defendant furnished these gloves, in fact, the inference is to the contrary, and if he had the character of gloves that could be caught, that again is something for which this defendant is not responsible.

10

20

The Court: I will reserve the motion at this time. I will reserve it.

(Whereupon the defendant by its counsel prays a bill of exceptions which is hereby allowed and sealed accordingly.)

(Seal)

30

The Court: You may renew your motion at the end of the case.

Mr. Gaskill: If the Court please, except for the medical testimony I will rest without calling any witnesses.

PLAINTIFF'S REBUTTAL.

FRANK S. CORNELL, recalled.

By Mr. Wescott:

Q. When Dr. Mecray examined you in the presence of Dr. Wescott, didn't he say that your leg was over an inch shorter than the other one?

10 A. Yes, sir; he measured.

No cross-examination.

FRANK S. CORNELL, recalled.

By Mr. Wescott:

20 Q. Will you sit on the edge of the chair (indicating witness' chair) if you can, stick your feet out side by side?

A. (Witness sticks feet out.)

By Mr. Gaskill:

Q. Are you sitting squarely against the back of the chair?

A. (Witness indicates his position in the chair.)

30 Mr. Wescott: Would you be better satisfied if he got on the floor on his back?

No cross-examination.

TESTIMONY CLOSED.

Mr. Gaskill: Now, I renew my motion.

The Court: I will hear the motion now.

After argument, the Court ruled as follows:

The Court: I have concluded that I am obliged to non-suit the plaintiff.

In the Seaboard Air Line Company case, Justice Pitney, writing the opinion of the Supreme Court, 10 held that where there is no proof of any failure upon the part of the defendant to comply with the Safety Appliances Act, then an action under the Federal Act is based upon the common law doctrine of negligence and the law of assumed risks also is applicable to the plaintiff.

In this case I cannot find any proof in accordance with the pleadings and the evidence that the defendant is guilty of any negligence based upon negligence in accordance with the pleadings, which is that "the 20 defendant negligently and carelessly, and without fault on the plaintiff's part, permitted certain spikes or bolts to protrude from said poles."

According to the evidence, it was the business of the plaintiff, who was a lineman, to unload these very poles with spikes in them, and the danger, if any, was incidental to the occupation and a risk which he assumed.

I am obliged, therefore, to grant the motion for non-suit and I will take the motion as at the end of 30 the plaintiff's case. I put it upon the ground that there was no proof of negligence in any duty that the defendant owed to the servant, and also upon the ground that there was no danger that was not just as apparent to the plaintiff as it was to the defendant. In fact, it was an obvious risk. I don't touch

the question of contributory negligence. If there was contributory negligence, then that would be matter of defense.

Mr. Wescott: We want an exception.

(Which exception is hereby allowed and sealed accordingly.)

10

WM. BOYLE,
Judge.

By agreement of counsel the testimony of Dr. Wesley J. Barrett, Dr. William A. Wescott and Dr. Paul M. Mecray has been omitted.

20

30

OPINION OF SUPREME COURT.

NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1917.

FRANK S. CORNELL, Plff. Applt.,	}	10
VS.		
WEST JERSEY AND SEASHORE RAILROAD COMPANY, Defendant.	}	OPINION.

Argued February Term, 1917. Decided June Term,
1917.

Wescott & Weaver, for plaintiff. 20

Gaskill & Gaskill, for defendant.

Argued before Justices Swayze, Minturn and
Kalisch.

Per Curiam:

This is an appeal from a judgment of a non-suit,
granted at Camden Common Pleas, in an action
brought under the Federal Employers' Liability Act. 30

The plaintiff was injured by a protruding spike,
under a log which he was handling, and which was
not within his view. The negligence against the
company is charged as follows: That the defendant
negligently and carelessly and without fault on the
plaintiff's part, permitted certain spikes or bolts to

Opinion of Supreme Court

protrude from said poles, which condition was unknown to the plaintiff. We are unable to perceive in what manner the provisions of the Federal Safety Appliances Act can be invoked in such a situation. The negligence charged against the company, is failure to disclose a latent danger. There is no allegation that the failure to supply hooks with which to handle the poles was the proximate cause of the injury.

10 The plaintiff testified that the spike which injured him was concealed so that in obeying instructions he could not see it, and because of this latent danger he received the injury. The bolt caught the plaintiff's glove, and the force of the falling log lifted him a distance as it went over the car, causing the injury.

We think this situation presented a jury question. It cannot be assumed that he saw the concealed hook or bolt or that it was his duty to see it.

20 The difficulty we have with the case is that as the evidence stands, it appears that the plaintiff who was employed as lineman, helped to unload poles, which had hooks in them, of which fact he alleges he had no knowledge or warning, and that in the haste with which the work was done he could not reasonably be expected to observe the condition of the pole.

The case also presents the inquiry whether there was any negligence on the part of the master in failing to use reasonable care to observe the conditions, all of which considerations present a jury question.

30 We think the case in its essential facts is not unlike that of *Hauser vs. American Surety Co.*, 85 L. 686, and the cases therein referred to.

The judgment of non-suit will be vacated and a *venire de novo* will issue.

Filed June 6, 1917.

Wm. C. Gebhardt, Clerk.

New Jersey Court of Errors and Appeals

Frank S. Cornell,
Plaintiff and Appellant,
now Respondent,
vs.
West Jersey & Seashore
Railroad Company,
Defendant and Respondent,
now Appellant.

BRIEF FOR APPELLANT

I.

This action was brought under the Federal Employers' Liability Act and the Federal Safety Appliances Act to recover for injuries sustained by the plaintiff on July 9th, 1915, while engaged in unloading telephone poles from defendant's train which was engaged in interstate commerce and transportation.

The charge of negligence is that the defendant permitted spikes or bolts to protrude from poles in a car, which plaintiff and others were unloading, without the knowledge of the plaintiff, whereby a spike or bolt of a pole caught in the plaintiff's glove and threw him to the ground, causing injuries.

The special defenses of the defendant were first, that the plaintiff had assumed the risks of the accident, and second that he had not exercised the degree of care required by law and third that there was no negligence on the part of the defendant under either act.

After hearing the testimony, Judge Boyle granted the motion and said (page 32):

“I put it upon the ground that there was no
“proof of negligence in any duty that the de-
“fendant owed to the servant, and also upon the
“ground that there was no danger that was not
“just as apparent to the plaintiff as it was to the
“defendant. In fact, it was an obvious risk.
“I don’t touch the question of contributory
“negligence. If there was contributory negli-
“gence, then that would be matter of defense.”

The defendant stated in its opening that the cause did not present facts coming under the Federal Safety Appliances Act, and the Judge called upon plaintiff’s attorneys to show in what respect that act applied. They could not do so. We have not yet been able to find anything in that act which relates to such a case as this—although we note from the brief below that plaintiff still relies on that act. A reference to that act and its supplements will show that it refers to the construction and equipment of engines and cars and to the various kinds of safety devices to be used on engines and cars.

On appeal by the plaintiff to the Supreme Court the judgment of non-suit was reversed and *venire de novo* was ordered. The defendant now appeals from that judgment and assigns error upon the record and the erroneous reversal of the judgment entered upon the non-suit.

II.

The facts are very simple, although the plaintiff attempts to conceal certain vital features. The plaintiff was and had been an employee of the defendant as a linesman for about five years (page 26) and was familiar therefore with the construction of lines of wires. On the day of the accident he was engaged with a gang of linesmen in the car unloading old telephone poles along the tracks of the company for the construction of a new line of wires. There were two section gangs there also, assisting them. While the plaintiff was lifting the top of a pole, some men at the other end gave it a twist with a cant hook to roll it off the top of the carload, but a spike or bolt caught in the plaintiff's glove and threw him out of the car with the pole.

The Supreme Court said:

“We are unable to perceive in what manner
“the provisions of the Federal Safety Appli-
“ances Act can be invoked in such a situation.
“The negligence charged against the company
“is failure to disclose a latent danger. There
“is no allegation that the failure to supply the
“hooks with which to handle the poles was the
“proximate cause of the injury.

“The plaintiff testified that the spike which
“injured him was concealed so that in obeying
“instructions he could not see it, and because
“of this latent danger he received the injury.
“The bolt caught the plaintiff's glove, and the
“force of the falling log lifted him a distance as
“it went over the car, causing the injury. We
“think this situation presented a jury ques-
“tion. *It cannot be assumed that he saw the*

*“concealed hook or bolt or that it was his duty
“to see it.”*

The Supreme Court accepted all of our contentions except that—“it was his duty to see it”—the bolt or spike. For that it relied upon *Hauser vs. American Surety Company*, 85 L. 686 and the cases therein referred to.

The plaintiff said that these poles (page 10, line 25) were about thirty feet long—*old poles* cut in half. Again (page 11) he said they were old poles, but he declares (page 12, line 10) that he didn't see the bolt when he was rolling the pole off the car. That the gang (page 13) partly lifted it and were ready to give it the final push and as the pole turned over, the bolt hooked him in the glove and pulled him off the car.

We respectfully call the attention of the Court to the plaintiff's language. We think the Court should be bound by the precise words used by the plaintiff and not draw conclusions from them.

“Q. Where was this bolt in reference to your ability to see?”

A. I didn't see the bolt. I was at the top of the pole and the bolt must have been concealed. If it had been plain, I could have seen it.

Q. The bolt was where?

A. In this pole, projecting up this way (indicating).

Q. Was it sticking upright?

A. No, sir; it was concealed.

Q. What do you mean?

A. It was hid.

Q. *You mean it was on the bottom part of the pole?*

A. *The bolt must have been turned down. I didn't see it.*

Q. *Was there any appearance of a bolt at all before your eyes?*

A. *No, sir.*'

In other words the plaintiff states that he did not see the bolt because it was protruding from the underside of the pole, and that is all the plaintiff does state. His suggestion that it was hidden or concealed from him by the thickness of the pole is of no weight. We submit that the protrusion of the spike or bolt from the underside of the pole was an obvious and not a latent danger.

On cross-examination (page 23, line 33) he admitted that when he got on the car he saw that the poles had been used before and that they were laid (page 24) butts and tops both at each end of the car. On the same page (line 25) he was asked whether he did not see, when he was climbing over the car of poles, that the tops had been cut for cross bars and said, "*No, sir—I wasn't looking for anything like that.*" However, he saw enough to put him on notice.

He said (page 25) that the first pole pushed off was the easiest one to handle, and the second one—that they were working on—was the next easiest. That the men at his end of the pole—the top—were lifting and the men at the other end rolled the butt with cant hooks.

Counsel took three pages of his brief in the Supreme Court in contending that there was no possible way by which the plaintiff could have determined whether there was a bolt in the underside of the top of this pole, but he overlooked entirely the fact that the *plaintiff could have felt under the pole with his*

hands, and that he could not have failed to have felt under the pole with his hands if he was lifting the top as stated. He was bound to have his eyes on his job and watch the pole as it was lifted and turned. However, the case is more serious for him than that, for he has admitted that he climbed upon this car of old poles and didn't take the trouble to look and see what shape they were in—whether the tops had been cut for cross bars. If he didn't look to see whether the poles were or were not cut for cross arms, he certainly didn't look closely enough to determine whether or not there were spikes in the poles. (The complaint charges that all these poles had bolts or spikes in them, and he can't successfully deny that now.)

The plaintiff's charge of negligence is that the defendant permitted spikes or bolts to protrude from this carload of poles without the knowledge of the plaintiff. It was entirely lawful to ship those poles and to use them over again. If the condition of the poles was obvious to the employees working upon them, they were bound to see that condition. There was no duty to warn employees of conditions obvious to them, which they could see if they took the trouble to look and see for themselves. That is well settled.

We submit that the plaintiff cannot impose liability on the defendant on the ground of negligence by saying that he was hurt by a condition that he did not take the trouble to look for. It was his duty as a linesman, and a person necessarily familiar with the handling and looks of poles, new and old, to observe whether they were new or old and if old what their condition was and whether dangerous. He declares that although he climbed up on this car of poles (and necessarily walked about on them more or less to

get his position), he did not observe whether or not they were cut for cross arms. That was certainly his duty because that would have disclosed whether or not spikes or bolts had been driven in them and whether or not spikes and bolts were likely to be in them at that time.

The trial Judge followed the well-settled law of New Jersey when he ruled that the plaintiff had not made a case against the defendant under the fourth paragraph of the complaint; namely, "That the defendant negligently and carelessly and without fault on the plaintiff's part permitted certain spikes or bolts to protrude from said poles, *which condition was unknown to the plaintiff.*" That there was no negligence in permitting spikes or bolts to protrude from the poles and in not warning the plaintiff specifically of that condition. We submit that the case at bar is not at all like the Hauser case or the cases therein cited, because the question involved was whether the negligent condition was obvious to an unskilled workman while engaged in an occupation in which he was untrained and to which he was unaccustomed, and which no one but a skilled workman could have discovered. We respectfully submit that these cases are not in point.

III.

As to cant hooks. The plaintiff said (page 21) that the gangs unloading these poles should have cant hooks, and in answer to the specific question as to whether that made the work safe, said yes. Objection was made to the matter being repeated as calling for a conclusion. The question was put in a different form and his conclusion again stated that the

use of the hook made the work easier and safer. This was subject to the objection and exception of the defendant. The matter, however, has little or no importance in the case, as he admitted (page 22, line 10) that the gang had two cant hooks and they were in use by part of the gang at work on the heavy end of the pole.

We submit that in the face of the testimony, it cannot be contended that there was any failure to supply cant hooks for the use of this gang, or that a cant hook would have made the plaintiff's work any easier or safer. It is impossible to lift with a cant hook, for cant hooks don't take hold for lifting purposes, but only for a twisting or turning movement.

The cant hook simply gives a leverage arm for use in turning a pole over.

IV.

As to assumption of risk. The Supreme Court of the United States held in the case of *Seaboard Air Line Ry. vs. Horton*, 233 U. S. 492, 58 Law Ed. 1062 that—"Assumption of risk is a defense to an action under the Federal Employers' Liability Act in all cases as at common law, except where the violation by a carrier of some federal statute enacted for the safety of employees contributed to the death or injury of a servant."

* * * * *

"An employee assumes the risk of injury from such dangers as are normally and necessarily incident to his employment, and which are presumably taken into consideration in fixing his compensation, irrespective of his actual knowledge of the danger."

This doctrine has been affirmed time and again by that court.

In the case of *Reed vs. Stockmeyer*, 74 Fed. Rep. 186; 20 C. C. A. 381 the Court said—"Where a servant is an adult of ordinary intelligence, he cannot relieve himself of the duty imposed by law in regard to assumption of risks on the ground that he is obeying orders of the master, or of a representative of the master, or because failure to obey will result in loss of employment." (Citing authorities.) Declining, he may lose employment; accepting, he assumes the risks attending the service, if he knows or has been properly warned of them. The servant is not under guardianship. He is a free man, at liberty to make such contracts as he will. That, through stress of circumstances, he consents to the orders of the master rather than be discharged from employment, does not impose liability upon the master because of such demand, if he has otherwise performed the duty which the law imposes upon him with respect to the servant."

In the case of *Hightower vs. So. Ry. Co.*, 91 S. E. 52 it appeared that the plaintiff had to drive spikes into new ties which were being put in the track. The plaintiff told the foreman that new spikes should be used because the ties were hard and the new spikes would be less likely to rebound or jump when being driven in. But the foreman directed him peremptorily to use the old spikes at once. Plaintiff then undertook to drive an old spike into a new tie when it rebounded, struck his leg and injured him. The Court said—"Thus, with knowledge equal, if not superior, to that of the defendant, he could not be relieved of his legal duty because the order was abrupt and peremptory, or because of a fear of losing his employment, or because he did not

have time to reflect upon the matter. Precisely that thing happened which the plaintiff anticipated.”

In the case of *Kalavis vs. No. Pac. Ry. Co.*, 165 Pac. Rep. 96 the plaintiff was riding on an inspection trip on a motor driven hand car with his foreman. The car carried a number of track tools. One of the tools fell off the front end of the car derailing it and injuring the plaintiff. The Court thought, considering the duties and positions of the men on the moving car, that the fault in not observing that the wrench was about to fall was the fault of Kalavis rather than the foreman. It was held there was no negligence on the part of the defendant and the plaintiff assumed whatever risk there was in riding on the car.

In the case of *Bjornsen vs. No. Pac. R. Co.*, 804 Wash. 220; 146 Pac. Rep. 575 it appears that the plaintiff was engaged in unloading cars of coal at the coal bunkers. The cars were shunted over the bunkers and unloaded through trap doors. This accident happened by reason of the dampness of the coal so that the doors were swollen and would not open when the fastenings were loosened. This was not unusual. When it happened it was usual to force iron bars down through the coal and hammer upon the doors. While plaintiff was attempting to force open the door in this manner he fell through with the coal into the bunkers. In affirming the judgment, the Court held that the evidence failed to make a cause of action against the defendant; that under the evidence the work had no peculiar hazards attending it and that it was not negligence on the part of the defendant to use cars such as plaintiff was unloading.

It is respectfully submitted that the judgment of the Supreme Court must be reversed and the judgment of non-suit in the Common Pleas be affirmed.

GASKILL & GASKILL,
*Attorneys of Defendant-
Appellant.*